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Issue Date: 29 June 2006

CASE NO.: 2004-LHC-01764

OWCP NO.: 06-102302

DARRELL E. RILEY
Claimant

v.

WALKER TOWING COMPANY
Employer

and

EMPLOYERS INSURANCE OF WAUSAU
Carrier

Appearances:

Stephen P. Moschetta (The Moschetta Law Firm),
Washington, Pennsylvania, for the Claimant

Charles D. Walter (Boehl, Stopher & Graves),
Lousville, Kentucky, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This matter arises from a claim for workers' compensation benefits filed by Darrell E. Riley (the "Claimant") against his former employer, the Walker Towing Company ("Walker") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"). The Claimant, who was employed by Walker as a welder on vessels used in navigation on the Ohio River, suffered a disabling injury to his back while working for Walker on February 7, 1987. In 1993, he accepted a lump sum payment pursuant to the provisions of section 8(i) of the LHWCA which closed his claim for disability compensation. However, Walker and its workers' compensation insurance carrier, Employers Insurance of Wausau ("Wausau"), remained responsible under the terms of the

settlement agreement and section 7 of the LHWCA for all reasonable and necessary medical care required for the Claimant's work-related back injury. The Claimant now seeks payment by Walker and Wausau for psychiatric care that he has received for depression and anxiety subsequent to the 1987 back injury and for back surgery that he underwent on September 5, 2000. Walker and Wausau denied liability for this care, and the parties were unable to resolve the issues raised by the claims during informal proceedings below before the District Director for the Office of Workers' Compensation Programs ("OWCP"). Consequently, the District Director referred the claim for medical care to Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA.

Pursuant to notice, a hearing was convened in Paducah, Kentucky on September 19, 2005, at which time all interested parties were afforded an opportunity to introduce evidence and argument in support of their positions. The Claimant appeared represented by counsel, and an appearance was made by an attorney representing Walker and Wausau. The Claimant testified at the hearing, and documentary evidence was admitted as Claimant Exhibits ("CX") 1-43 and Employer Exhibits ("EX") A-D. Hearing Transcript at 12-13, 18. At the conclusion of the hearing the record was held open at the Claimant's unopposed request for the purpose of offering additional evidence and for the Respondents to offer any rebuttal. TR 75-76. Within the time allowed, the parties have offered the following additional exhibits:

Report of John Griffin, M.D. dated 10/26/05	EX E;
Lyon Drug Store Prescription Record dated 10/15/05	CX 44;
Report of Benjamin Parker, M.D. dated 11/1/05	CX 45;
Four Rivers Behavioral Health Office Notes	CX 46; and
Deposition of Manuel R. Weiss, M.D. taken 9/22/03	CX 47.

No objection has been raised with respect to EX E or CX 44-46. Accordingly, these exhibits have been admitted into evidence. The Employer objects to the admission of CX 47 which I have excluded from evidence for the reasons outlined below. After the parties were allowed time in which to file post-hearing briefs which were received from both parties, the record was closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant has established that he is entitled to have Walker provide for his mental health care as the evidence shows that his depression and anxiety are legitimate consequences of the February 7, 1987 injury. However, I further conclude that the Claimant has not established that the second back surgery amounted to appropriate care for the February 7, 1987 injury or its legitimate consequences. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

The Claimant is a 56 year old former high school basketball star who, by his own admission, is marginally literate and was allowed to complete high school due to his athletic skills. TR 22-23. After graduation, he went to work as a welder/tacker on the riverfront. TR 24. He denies any low back problems prior to the workplace injury that he sustained while employed by Walker on February 7, 1987. TR 27. He testified that on February 7, 1987, he felt something pull in his back as he and co-workers were attempting to lift a scaffold from a flat barge to a dry dock. TR 27. He sought medical treatment and underwent back surgery consisting of bilateral partial hemilaminectomies at L4-5 and L5-S1 and L4 and L5 discectomies on February 28, 1987 by Robert Meriwether, M.D. for herniated L4-5 and L5-S1 discs. CX 8 at 3. He attempted to return to work but stopped after about a month, testifying that he was not able to tolerate the climbing and crawling required to do his job as a welder. TR 29-30. He has not returned to Walker or any other employment since that time. TR 29.

The Claimant testified that his mental state deteriorated after the surgery as his "nerves just started going downhill" when he was unable to work and that he is no longer able to participate in the social and recreational activities that he enjoyed with coworkers prior to the back injury. TR 29-31. As a result of the problems with his nerves, he first sought psychiatric treatment in January of 1988 and has continued to receive psychiatric care which includes both medication and therapy. TR 35-37; CX 36. At the time that this treatment began, a senior psychiatric social worker reported that the Claimant was "having much difficulty accepting the loss of the vocation he knew because of his injury" and that he had experienced "fear of the future and how he will provide for his family." CX 36 at 53. The Claimant said that he was able to cope with life and family stresses prior to the injury, but he is now unable to do so and is estranged from his family. TR 44-45. He also testified that his low back and right leg symptoms worsened over the years between 1987 and 2000 to the point that he reluctantly submitted to the second back surgery on September 5, 2000. TR 32-34; CX 27. The second surgery was performed by Marius Maxwell, M.D., Ph.D., a neurosurgeon, who reported that the Claimant was "crippled by the pain" and had L4-L5 and L5-S1 disc herniations confirmed by MRI and myelogram studies. CX 8. The Claimant testified that he still suffers from constant back and right leg pain which severely limits his daily activities. TR 39-43.

B. Admissibility of CX 47

Among the post-hearing exhibits offered by the Claimant is the transcript of a deposition taken on Manuel Robert Weiss, M.D. on September 22, 2003 in the matter of *Dyer v. Jackson Purchase Rural Electric*, Civil Action No. 00-CI-00241 which was before the Circuit Court of McCracken County, Kentucky.[1] In a November 16, 2005 cover letter which accompanied the post-hearing exhibits, the Claimant's attorney stated that he had spoken to opposing counsel who had no objection to the admission of the deposition transcript. However, Walker's attorney responded in a letter dated November 23, 2005,

[1] Dr. Weiss examined the Claimant at Walker's request.

objecting to the admission of the transcript on hearsay and relevance grounds. Walker's attorney explained that he initially did not object to the introduction of the deposition transcript because he was under the impression from his conversation with the Claimant's attorney that the testimony was directly related to Dr. Weiss's evaluation of the Claimant, but he had determined, upon review of the transcript, that Dr. Weiss's deposition testimony concerns his evaluation in an unrelated case. Walker thus asserts that the transcript should be excluded as having no relevance to the instant case and because its attorney had no opportunity to cross-examine Dr. Weiss. The Claimant has not responded to Walker's objection.

Walker was not a party to the state court case in which Dr. Weiss's deposition was taken. Since Walker had no opportunity to cross-examine Dr. Weiss, admission of the deposition transcript would violate Walker's basic right to due process. *See Bethlehem Steel Corp. v. Clayton*, 578 F.2d 113, 114 (5th Cir. 1978); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275, 277 (5th Cir. 1951). *Cf. Avondale Shipyards v. Vinson*, 623 F.2d 1117, 1121-1122 (5th Cir**.** 1980) (allowing admission of *ex parte* medical report where opposing party was provided with opportunity for post-hearing cross-examination). Accordingly, Walker's objection is sustained, and CX 47 is excluded from evidence.

C. Medical Opinions

The Claimant introduced an "independent medical evaluation" from Richard E. Fishbein, M.D., and orthopedic surgeon who examined the Claimant on February 8, 2005 and reviewed the medical records including the reports from Drs. Meriwether and Maxwell. CX 35 at 1. Dr. Fishbein stated that it is his opinion that "there is direct causation between his work injury and his low back symptoms" and that "[h]is second surgery was due to an anatomical change originating from his work injury." *Id.* at 2. He further stated that the Claimant had reached a point of maximum medical improvement and world require continued treatment for symptom relief in the future. *Id.*

Walker responded to Dr. Fishbein's opinions with two reports from Dr. Weiss who also reviewed the medical records and examined the Claimant. In his initial report of January 15, 2002, Dr. Weiss stated,

> At first glance, reviewing all the medical records available, I see no direct connection to a laminectomy carried out at L4-5 to one carried out at L5-S1 many years ago. It was over a decade hiatus. On the other hand, apparently L5-S1 was reoperated on. If there is evidence that he had a recurrent disc herniation there, then of course there might be some relationship of the new operation to the old one and old injury. I basically need his imaging studies.

EX D at 120. After Dr. Weiss had an opportunity to review the MRI and myelogram studies that were done prior to the September 5, 2000 surgery, he offered the following additional comments:

> Copies of the MRI were poorly reproduced with poor contrast, which is often the case with this type of photocopying. In any event, I think the study was

marginally "readable" and I saw no evidence of a disc herniation. I think the partial report that was sent suggested that the radiologist thought there was a "broad based mild L4-5 disc herniation of questionable clinical significanice". Frankly, there is no clinical significance in my mind of the really minimal bulge of that L4-5 disc on MR. Both the sagittal and axial reconstructions were quite benign to me. It appears there is some mild postop change at L5-Sl, but again, I am hard pressed to say that there is any "herniation" which "deviates the left S1 nerve root posteriorly" as suggested in the radiologist's report. This is kind of a mystery to me, because I have perused these studies very carefully and I can see no evidence of neural impingement whatsoever.

The patient underwent a rnyelogram and post-myelogram CT a couple of months later. The rnyelogram actually looks fine to me with adequate root sleeve filling at every level. The post myelogram CT shows a bulge of principally protruding bone, not disc, caudal to the SI interspace. This disc is essentially a normal finding. Otherwise, try as I might, I can see no evidence of any disc herniation there.

The radiologist's report, again, talks about disc herniations at various levels and postop change. Frankly, I really don't see a surgical lesion on any of these studies.

From my perspective, this man requiring surgery is a whole other issue. I assume there may have been some clinical aspects of this man's case that suggested to his surgeon that an operation might be beneficial. In hindsight, as I review these imaging studies, I really can see nothing that would have prompted me to consider an operation. However, that is probably a moot point since I did not have the opportunity to examine this patient at the time. On the other hand, with these films in hand, and the clinical exam and the records that have available, I cannot see any relationship of the more recently performed operation, to an injury that was sustained many years ago in the 1980's. One of the problems that I can see here is that you have radiologist's reports discussing pathology, that I see no evidence of. There is a surgical procedure that was done based on that pathology, again that I am mystified about and then of course there is going to be the whole issue as to the fact that he underwent a surgery at one of those levels more remotely, for that work injury. This probably will raise some issues and arguments, but from my perspective, it really seems that this most recent operation had nothing to do with the old operation, old injury, etc.

A lot of this is based on the fact that I really don't see any recurrent pathology on the recent imaging studies.

EX D at 122-123 (internal quotation marks in original). In addition to the opinions from Drs. Fishbein and Weiss, the parties introduced expert opinions on the relationship between the February 7, 1987 back injury and the Claimant's mental health care.

In support of his claim for coverage of his mental health treatment, the Claimant introduced records covering the care that he has received since January 18, 1988 when he was initially seen in a "state of depression and upset with complaints of chronic pain." CX 37 at 53. At that time, it was reported that he was also "very frightened about providing for his family as he can no longer do the work of his previous job as a welder." *Id.* The records reflect that the Claimant's mental health history is complex with multiple contributory factors, such as family conflicts and illiteracy, in addition to his back injury and anxiety and depression resulting from his disability and financial concerns. *See* CX 37 at 66-67, 75-77, 78-80, 81-82, 85-86, 96-98, 104, 108, 115, 117, 118, 120, 128, 135; CX 46; EX B.

Walker introduced reports and deposition testimony from John J. Griffin, M.D., a psychiatrist who evaluated the Claimant at Walker's request in 1999 and 2004. Dr. Griffin's *curriculum vitae*, which was introduced during his deposition as Exhibit 1, indicates that he is board-certified in psychiatry and neurology and has been practicing psychiatry since 1973. *Id.* at 33-34. He also performs evaluations for litigation purposes with approximately 85 to 90 percent of these evaluations for defendants and the remainder for plaintiffs. *Id.* at 28-29. In his earliest report, which is dated May 13, 1999, Dr. Griffin thoroughly reviewed the Claimant's history and rendered a diagnostic impression of (1) Personality Disorder, Not Otherwise Specified with Dependent Features and Mild Anxiety, and (2) Learning Disabilities with Borderline Intellectual Functioning. EX A at 38. He further stated,

> In my opinion, this man's psychiatric condition was not caused by any work related injury. His condition pre-existed the injury at work in 1987. The symptoms of anxiety and depression emanate primarily from the personality disorder, although Mr. Riley himself attributes all of his difficulties to the injury and subsequent surgery. It is unlikely that any type of psychiatric treatment will substantially change his condition.

Id. Dr. Griffin reevaluated the Claimant on May 26, 2004, and he discussed his findings and opinions in a letter to Walker's lawyer dated May 27, 2004. EX A at 39. His diagnostic impression remained the same, and he did not change his opinion that the Claimant's psychiatric condition is unrelated to the February 7, 1987 injury. *Id.* at 41. Dr. Griffin was examined regarding these opinions at a deposition taken on August 26, 2004. He testified that he did not agree with the other mental health professionals on the cause of the Claimant's psychiatric condition as it was his opinion that the Claimant suffers from a personality disorder that is unrelated to the work injury of February 7, 1987. EX A at 11-12, 15, 18. He said that he did not see any reference in the medical records to the Claimant receiving psychiatric treatment early in life, but he remained of the opinion that the Claimant's psychiatric condition pre-existed the work-related injury in 1987. *Id.* at 14-15. He explained that it seemed to him that the Claimant's anxiety and depression symptoms were "a continuation of his pre-existing personality disorder, pre-existing 1987, as well as his learning difficulties and difficulties in functioning I thought were related those issues of who he was, early life experiences, family background, his personality disorder." *Id.* at 15. He further stated that it was his opinion after the May 26, 2004 examination that none of the Claimant's psychiatric conditions and symptoms resulted from the work-related injury of February 7, 1987 and that additional psychiatric treatment would be unlikely to substantially change the Claimant's condition. *Id.* at 16-17. Thus, he said that he

would not recommend that the Claimant receive any additional psychiatric treatment other than supportive and monitoring treatment, although he stated that it was appropriate for the Claimant to have psychiatric medications prescribed by his physician. *Id.* at 16, 18.

On cross-examination by the Claimant's attorney, Dr. Griffin stated that he believed that the Claimant had some "mild symptoms of depression" but not depressive disorder, and he agreed that chronic pain, disability, and loss of usual income can all lead to depression. *Id.* at 20-21. He acknowledged that the Claimant's records showed that he had been prescribed anti-depressant medication and that the dosage of one such medication, Paxil, had quadrupled between 1999 and 2004 and that there was no indication in the records that the Claimant had any psychiatric or psychological treatment or counseling prior to the 1987 injury. *Id.* at 21-22. He further acknowledged that he did not know when the Claimant first sought mental health assistance, and he agreed that the history and symptoms recited in the mental health records from 1988 (*i.e.*, that he was having difficulty accepting the loss of his vocation because of his injury and that he was fearful of the future and how he would provide for his family) was not inconsistent with the history that the Claimant had related to him. *Id.* at 24-25. On redirect examination, Dr. Griffin testified that the report from the senior psychiatric social worker at the time that the Claimant first sought psychiatric treatment in 1988, which states that the Claimant was having difficulty accepting the loss of his vocation and was concerned about providing for his family (CX 36 at 53), did not change his opinion that the Claimant's psychiatric condition is not related to the February 7, 1987 back injury. *Id.* at 30.

Dr. Griffin submitted a third report dated October 26, 2005 in which he reviewed the Claimant's most recent psychiatric records and stated that he stands by the opinions previously rendered, concluding, "[i]t is my professional opinion that the diagnoses of Personality Disorder and Learning Difficulty remain valid, that Mr. Riley's current symptoms are reflective of these diagnoses, and neither diagnosis is caused by the work events in 1987." EX E.

In response to Dr. Griffin's opinions, the Claimant submitted a letter dated November 1, 2005 from Benjamin L. Parker, M.D., a psychiatrist who treated him from 1994 to 2000 and again since 2005 when he returned to Four Rivers Behavioral Health. CX 45. In this letter, Dr. Parker reviewed the Claimant's mental health history and stated that his diagnosis for the Claimant's psychiatric condition, depression and generalized anxiety along with dysthymic mood symptoms, has remained the same from 1988 to the present. *Id.* at 1. Dr. Parker further stated that the Claimant's anxiety "extends from legal entanglements and legal issues along with financial issues regarding his work and his inability to work." *Id.* He commented that the Claimant had never reported any problems with work prior to the injury, and he noted that the Claimant had responded best to Klonopin and anti-depressant medication which, he said, "plays against" Dr. Griffin's diagnosis of a personality disorder. *Id.* He also stated that although a personality disorder would predate the Claimant's depression, the presence of a personality disorder would not rule out a depressive disorder, especially secondary to situations beyond the Claimant's control, and would make it more difficult for the Claimant to adapt to a new environment. *Id.* Dr. Parker attributed the Claimant's anxiety to financial insecurity and his depression to his inability to seek any type of employment, and he stated that Dr. Griffin's opinions do not preclude a diagnosis of depression and anxiety especially since the Claimant was taking medication at the time of his evaluations. *Id.* He noted that the Claimant had a work

history of 15 years without problems prior to the injury and that the Claimant denied any problems with anxiety or depression prior to seeking treatment in 1988. *Id.* at 2. Dr. Parker also questioned Dr. Griffin's diagnosis of learning disability or borderline intellectual functioning, stating that he saw no evidence of dysfunction in the Claimant's past work history, though he conceded that he had not initially interviewed or treated the Claimant.[2] Dr. Parker continued in his criticism of Dr. Griffin's opinions, stating that the latter gave no consideration in his reports to the Claimant's signs and symptoms of depression. *Id.* Finally, Dr. Parker suggested that "cultural differences" between the Claimant, who is from a rural area of western Kentucky, and Dr. Griffin, who practices in Nashville, may have caused Dr. Griffin to underappreciate the Claimant's symptoms given the fact that the Claimant tends to describe his psychiatric symptoms "in phrases that are consistent with alexthymia[3] that are common in rural but not urban areas of Kentucky. *Id.*

D. Is Walker liable for the Claimant's second back surgery and psychiatric care?

Section 7(a) of the LHWCA provides that and "employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The regulations implementing section 7(a) provide that medical care includes "laboratory, x-ray, and other technical services . . . recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. § 702.401. An employer must provide medical services for all legitimate consequences of a compensable injury, even if the consequences are attributed to a chosen physician's lack of skill or erroneous judgment; *Lindsay v. George Wash. Univ.*, 279 F.2d 819, 820 (D.C. Cir. 1960); but an intervening cause, including an employee's own deliberate misconduct, "may sever the causal connection between an original work-related injury and subsequent consequences a worker may suffer." *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051 (5th Cir. 1983), 1 A. Larson, The Law of Workmen's Compensation § 1300 (1980) ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."). The burden is on the Claimant to establish that medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). *See also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-280 (1994). A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). If medical treatment is in part necessitated by a work-related condition, the entire cost of the treatment is compensable. *Turner*, 16 BRBS at 258. *See also Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988).

[2] It is noted that during his cross-examination of Dr. Griffin at the August 26, 2004 deposition, the Claimant's attorney stated that the Claimant's IQ had been measured at 65, and Dr. Griffin testified that he also estimated the Claimant's IQ to be in that range. EX A at 26.

[3] Alexthymia is defined as an inability to express one's emotions. Dorland's Illustrated Medical Dictionary (28th Ed. 1994) at 44.

The Claimant contends that Walker must pay for the second back surgery and mental health care because his need for these interventions is a natural and unavoidable result of the February 7, 1987 back injury that he suffered while working for Walker. Claimant Brief at 13-14. Walker counters that it is not attempting to shirk its responsibilities under section 7, but that it is "unreasonable to request these defendants to pay for psychiatric treatment which has no relationship whatsoever with the work injury or to pay for an unnecessary low back procedure which occurred some 13 years after the incident and has provided no true objective relief to plaintiff." Walker Brief at 8.

The Second Back Surgery

Dr. Fishbein stated that there is a direct causal relationship between the Claimant's injury on February 7, 1987 and his continuing low back symptoms and that the second surgery was required because of an anatomical change originating from this injury. Dr. Weiss conceded that there might be some relationship between the original workplace injury and the second surgery if there was evidence of a recurrent herniated disc at L5-S1, but he found no evidence of any herniation in his review of the medical records and ultimately concluded that the second surgery was unnecessary and had noting to do with the February 7, 1987 injury. Unlike Dr. Weiss who discussed the Claimant's MRI, myelogram and CT scan results in detail, Dr. Fishbein did not specifically mention the medical evidence, and he did not specifically describe the anatomical change that he related to the February 7, 1987 injury. The Claimant points out that Dr. Maxwell found herniated disc during the September 5, 2000 surgery and that it is "incredible (and, frankly disturbing)" that Dr. Weiss failed to mention this finding in his reports. Claimant Brief at 10. On the surface, it would thus appear that Dr. Fishbein's opinion is better supported by the objective medical evidence. However, closer examination reveals that there is a devil in the details.

The MRI study was performed on June 26, 2000 and interpreted by radiologist William A. Guyette, M.D. as showing (1) a "Broad-based, mild L4-L5 disc herniation of questionable clinical significance" and (2) "Mild central to leftward L5-S1 disc herniation, which deviates to the left S1 nerve root posteriorly, but produces no definite nerve root swelling." CX 16 at 2. A myelogram and post-myelogram CT scan with contrast were performed six weeks later on August 8, 2000. CX 19. The interpreting radiologist reported that no herniated discs were seen in the myelogram which was normal except for evidence of prior lumbar surgery at the L4-5 level. *Id.* at 5. The CT scan was also reported to be normal with no evidence of any herniated discs. *Id.* at 6. One week after these imaging studies, Dr. Maxwell saw the Claimant and made the following comments in an office note dated August 15, 2000:

> Lumbosacral MRI scan shows L4-5 and L5-S1 disc herniation. <u>This is confirmed by his lumbosacral CT myelogram</u>. He is really crippled by the pain. He is agreeable to proceeding to bilateral L4-5 and L5-S1 hemilaminectomy and discectomy.

CX 17 at 3 (underlining supplied). In his operative report of the bilateral L4-5 and L5-S1 hemilaminectomy and discectomy with medial facetectomy and foraminotomy performed on September 5, 2000, Dr. Maxwell also reported finding of herniated discs during the surgery:

> Medial retraction of first the left then the right L5 nerve root revealed the disc herniation, the dome of which was coagulated.
>
> * * * * *
>
> Attention was then turned to the L5-S1 interspace, and . . . [m]edial retraction of the S1 nerve roots revealed disc herniation, the dome of which was coagulated and incised, with the bilateral disectomy being performed after a medial facetectomy and foraminotomy had been performed with Kerrison rongeurs and the drill.

Id. at 7. Not surprisingly, Dr. Maxwell's pre-operative and post-operative diagnosis was the same: "L4-L5 and L5-S1 disc herniations." *Id.* at 6.

Which physician got it right? Dr. Guyette, the radiologist who interpreted the MRI and reported finding herniated disc at both the L4-5 and L5-S1 levels? Dr. Weiss who read a copy of the MRI, which he described as "poorly reproduced with poor contrast" and "marginally" readable, and was "hard pressed" to find any L5-S1 herniation (EX D at 122)? Dr. Brown, the radiologist who reported that the myelogram and CT scan were normal with no evidence of herniated disc? Or is it Dr. Maxwell who mistakenly stated that the MRI findings of herniated discs were confirmed by the myelogram and CT scan, and who reportedly saw herniations at both levels during surgery? This is no easy call. Since the record does not show that Drs. Weiss and Maxwell possess any special qualifications in radiology, it seem reasonable to give greater weight to the interpretations of the neutral radiologists, especially where Dr. Weiss admittedly based his opinion on an interpretation of a poorly reproduced and marginally readable copy of the MRI. *See generally Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993) ("Administrative factfinders simply cannot consider the quantity of [x-ray] evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts"). However, giving the nod to the radiologists does not serve to clarify the matter because, contrary to Dr. Maxwell, the myelogram and CT scan did not confirm the MRI finding of herniated discs. Rather, the interpretations of the imaging studies appear to be in direct conflict. The Claimant argues that Dr. Maxwell's anatomical finding of herniated discs during surgery should put any questions to rest, but is this finding reliable in light of the doctor's erroneous statement that the MRI findings were confirmed by the subsequent studies?

The foregoing discussion shows that there are substantial reasons to question all of the medical opinions bearing on the issue of whether the September 5, 2000 surgery amounted to appropriate medical care for the February 7, 1987 back injury and its consequences. In short, I cannot credit Dr. Fishbein's cursory opinion on this confusing record, particularly where he did not address the significant inconsistencies in the interpretations of the imaging studies and Dr. Maxwell's reports. Since the Claimant bears the ultimate burden of proof in a claim for

coverage of medical treatment, I am constrained to conclude that he has not established entitlement under section 7 of the LHWCA to have Walker pay for his second back surgery.

Mental Health Treatment

The Claimant's mental health treatment is also controversial. Dr. Parker, the treating psychiatrist, states that the Claimant has been treated for depression and anxiety since 1988 and that these conditions are related to the financial and social consequences of the February 7, 1987 injury which left him unable to work. Dr. Parker questioned Dr. Griffin's primary diagnosis of a personality disorder, noting that the Claimant's response to anti-depressant medication is inconsistent with a personality disorder. While he agreed that any personality disorder would have pre-existed the February 7, 1987 injury, Dr. Parker pointed out that the presence of a personality disorder would not rule out depression, that the Claimant had not experienced mental problems requiring treatment prior to 1988 and that Dr. Griffin either ignored or possibly overlooked the Claimant's depressive symptoms. Dr. Griffin disagrees, stating that the Claimant's mental health problems are attributable to a pre-existing personality disorder, borderline intellectual functioning and learning disability which have no relationship to the February 7, 1987 back injury. Dr. Griffin did, however, concede that the Claimant has some symptoms of depression, but not a depressive disorder, and he agreed that chronic pain, disability, and loss of usual income can all lead to depression. As outlined above, the Claimant's mental health records clearly show that he first sought treatment in early 1988 because of difficulty that he has experiencing dealing with his loss of vocation and anxiety over the financial future of his family. Even if Dr. Griffin is correct in his alternate diagnosis of pre-existing conditions, there is no dispute that the Claimant's symptoms of depression and anxiety did not become severe enough to warrant medical intervention until after the February 7, 1987 when stressors directly attributable to the consequences of the injury came into play. Under these circumstances, I find that Dr. Parker's opinion is supported by the "more reasonable inference in the light of the evidence as a whole and the 'common sense of the situation.'" *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962), quoting *Avignone Freres, Inc. v. Cardillo*, 117 F.2d 385, 386 D.C. Cir. 1940). Accordingly, I conclude that the Claimant has met his burden of proving that his ongoing mental health treatment constitutes appropriate care for the legitimate consequences of his February 7, 1987 back injury.

V. Order

Based on the foregoing findings of fact and conclusions of law, the claim of Darrell Riley for medical care pursuant to 33 U.S.C. § 907 is **DENIED** with respect to the September 5, 2000 back surgery and **GRANTED** with respect to ongoing mental health treatment for depression and anxiety. Accordingly, the following order is entered:

(1) Walker Towing Company and Employers Insurance of Wausau shall (a) provide the Claimant Darrell Riley with all appropriate medical care for the depression and anxiety conditions diagnosed by Dr. Benjamin L. Parker as legitimate consequences of the Claimant's work-related back injury of February 7, 1987, and (b) pay any and all outstanding bills for such care; and

(2) The Claimant's attorneys shall have 30 days from the date this decision and order is filed with the District Director to submit a fully supported and fully documented application for an award of attorney's fees pursuant to 33 U.S.C. § 928, and the Respondent Employer and Carrier shall have 15 days following receipt of the fee application to file any objections.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts